

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY, MARYLAND**

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www.montgomerycountymd.gov/content/council/zah/index.asp

**PETITION OF ESTHER C. SHAFFER
for a special exception for a child day care
facility (a group day care home) for up to
12 children on property located at 19227
Golden Meadow Drive, Germantown, Maryland**

Esther C. Shaffer, *pro se*

In Support of the Petition

Martin Klauber, People's Counsel

In Support of the Petition

Robin Rice

In Support of the Petition

Frank Neher and Edwin Melendez

In Opposition to the Petition

Before: Martin L. Grossman, Hearing Examiner

Special Exception No. 09-4

HEARING EXAMINER'S OPINION AND DECISION

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	2
II. FACTUAL BACKGROUND	4
A. Subject Property and Surrounding Neighborhood.....	4
B. The Proposed Use, Landscaping, Lighting, Signage and the Environment.....	8
C. Master Plan Conformance and Compatibility with the Neighborhood.....	15
D. Transportation.....	16
E. Community Reaction	17
III. FINDINGS AND CONCLUSIONS	19
A. Standard for Evaluation	20
B. Specific Standards.....	23
C. General Standards	26
D. Additional Applicable Standards	30
IV. DECISION.....	34

I. STATEMENT OF THE CASE

Petition S.E. 09-4, filed on April 1, 2009, requested a special exception to operate a child day care center for up to 15 children. On August 27, 2009, at the urging of Technical Staff of the Maryland-National Capital Park and Planning Commission, Petitioner filed an amended petition (Exhibit 23(a)), reducing the maximum number of children to 12, thereby converting the application into one for a “group day care home” under Zoning Ordinance §59-A-2.1.¹ The facility would be located in the basement and first floor of an existing single-family, detached home at 19227 Golden Meadow Drive, Germantown, Maryland, in the R-90 Zone (Cluster).

Petitioner, who owns and resides in the home, has been operating a licensed child care business (*i.e.*, a “family day care home”) in her home for up to 7 children for nearly three years (Exhibits 15 and 31(a), p. 1),² but a special exception is required to operate a group day care home in the R-90 Zone (Cluster), pursuant to Zoning Ordinance §59-C-1.531. The day care facility is called “Five Star Daycare.”

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On April 2, 2009, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on September 18, 2009, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 19).

¹ A “group day care home” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “child day care centers” for 13 or more children. A “group day care home” is defined in §59-A-2.1 as:

A dwelling in which child day care services are provided:

- a. in the home where the licensee is the provider and is a resident;
- b. for 9 but not more than 12 children including the children of the provider, and;
- c. where staffing complies with state and local regulations, but no more than 3 non- resident staff members are on site at any time.

² Petitioner’s Statement of Operations (Exhibit 31(a)) claims that Petitioner is currently licensed for up to 8 children, and she so stated in her testimony (Tr. 14), but the license in the record (Exhibit 15) specifies a maximum of 7 children.

The only opposition letter was filed by the Seneca Park North Home Owners Association (SPNHOA), which raised concerns about noise, parking, safety and home values (Exhibit 22). That letter was filed prior to the amendment of the petition, and no one from the SPNHOA appeared at the hearing. Six letters of support for the day care facility were received (Exhibits 14 (4 letters), 26, and 28.) The signers of the September 7, 2009 faxed letter in support of the petition (Exhibit 26) are residents of the Seneca Park North Subdivision, where the subject site is located.

The Technical Staff of the Maryland-National Capital Park and Planning Commission reviewed the petition and, in a report dated August 24, 2009, recommended approval with conditions (Exhibit 25).³ The Montgomery County Planning Board (“Planning Board”) voted unanimously on September 10, 2009, to endorse the Technical Staff’s recommendation (Exhibit 29).

The hearing was convened, as scheduled, on September 28, 2009, and testimony was presented in support of the petition by Petitioner Esther C. Shaffer, who appeared, *pro se*. Tr. 14-39. She adopted the findings and conclusions in the Technical Staff report as a part of her testimony and agreed to the conditions Staff recommended. Tr. 13-14. Additional testimony in support was presented by Ms. Robin Rice, who lives in a different part of the County and runs her own daycare facility. Ms. Rice offered helpful suggestions for framing the Statement of Operations. Tr. 39-76. The People’s Counsel, Martin Klauber, Esquire was unable to attend the hearing, but wrote a letter to the Hearing Examiner indicating his support for the petition (Exhibit 27). Two neighbors appeared in opposition. Petitioner’s next-door neighbor, Frank Neher, expressed his concern about noise, mostly from outdoor play (Tr. 77-93), and Edwin Melendez, who lives a block away, testified about traffic and parking problems in the neighborhood (Tr. 93-145).

The record was held open until September 28, 2009, to permit the Petitioner to submit a revised Statement of Operations based on Ms. Rice’s suggestions stated at the public hearing.

³ The Technical Staff report is frequently quoted and paraphrased herein.

Petitioner did so (Exhibit 31), and the record closed as scheduled on September 28, 2009.

II. FACTUAL BACKGROUND

A. Subject Property and Surrounding Neighborhood

The proposed group day care home would operate in an existing, single-family, detached, two-story home, at 19227 Golden Meadow Drive, Germantown, Maryland. It is located on the east side of Golden Meadow Drive between Winding Brook Lane and Flanagan Lane. The property's legal description is Lot 66, Block C in the Seneca Park North subdivision, and it contains 6,279 square feet of land.⁴ Its location can be seen on the following Map appended to the Technical Staff report as Attachment 1:



⁴ As noted by Technical Staff, the standard lot size for a lot located in the R-90 zone is 9,000 square feet. However, this subdivision is a cluster development that allows for variations in lot sizes in order to preserve open space, tree cover, and recreational areas within the subdivision. Exhibit 25, p. 2.

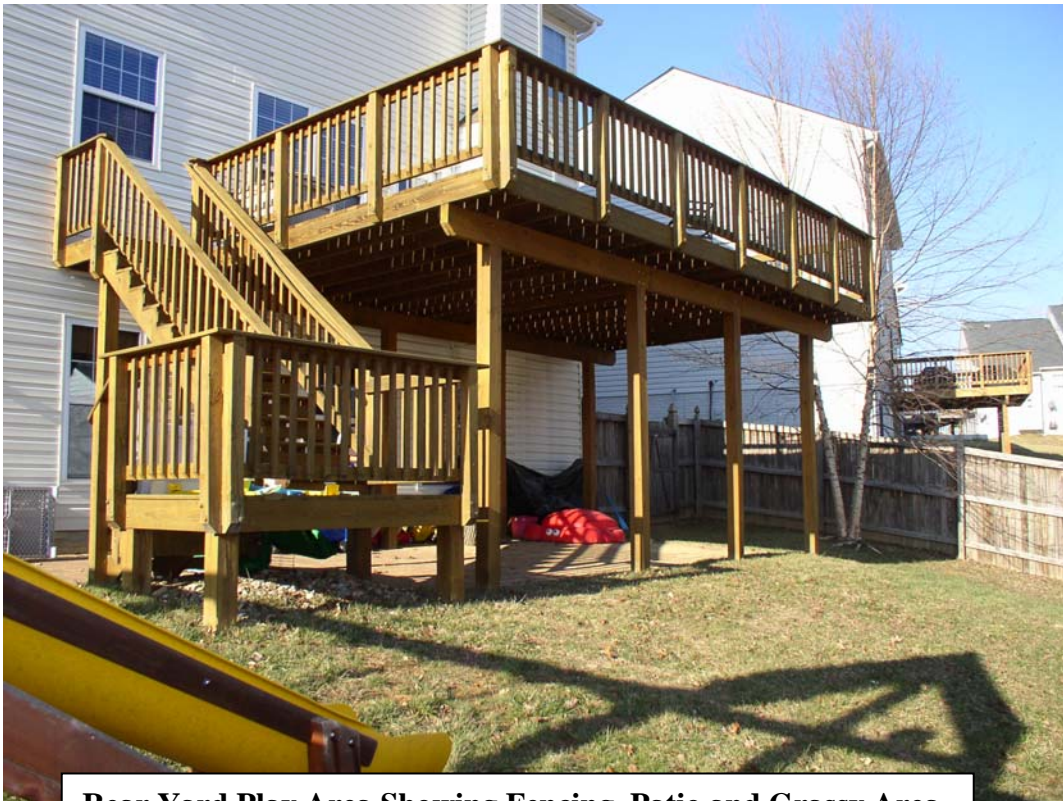
Technical Staff reports that the property has approximately 63 feet of street frontage along Golden Meadow Drive, and is improved with a two-story frame dwelling, constructed in 1995. The dwelling is set back approximately 30 feet from Golden Meadow Drive, and it has a left side yard of approximately 10.5 feet, a right side yard of approximately 14 feet and a rear yard of approximately 30 feet.

The site is accessed via a concrete driveway from Golden Meadow Drive. The 30-foot long driveway provides access to the two-car, attached garage. Technical Staff indicates that the driveway provides parking for at least 4 vehicles (stacked). Exhibit 25, p. 3.

The property is relatively flat in the front yard and slopes gently downward in the rear yard. Both the front and rear yards are landscaped with mature trees, shrubs and flowers. The rear yard of the property is fenced and contains a wooden deck, a swing set and a play area for use by the children. These features can be seen in photographs supplied by the Petitioner (Exhibits 6(a) – 6(c)):



Front of House and Driveway Drop-off/Pick-up Area

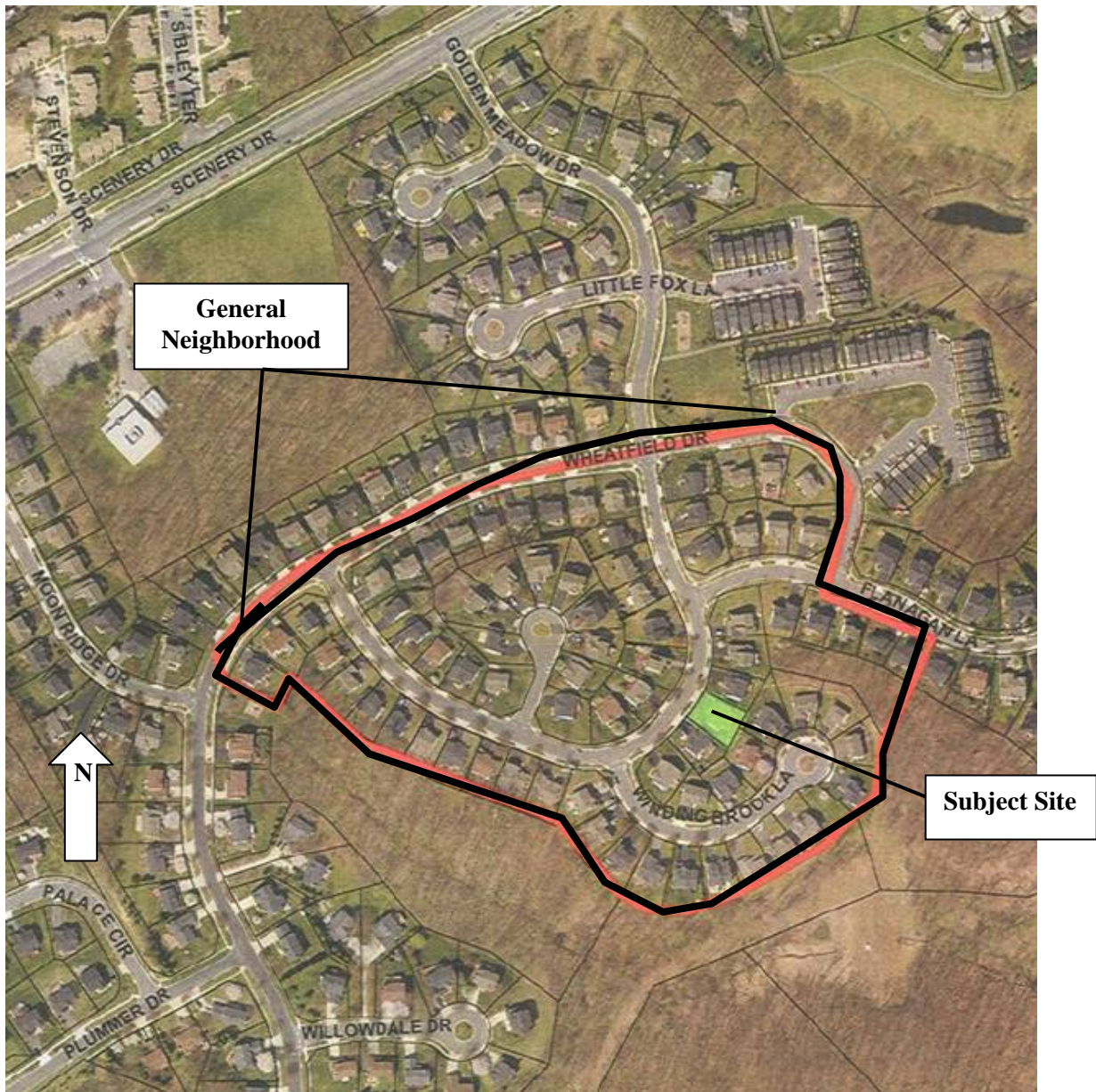


Rear Yard Play Area Showing Fencing, Patio and Grassy Area



Rear Yard Play Area Showing Fencing, Play Set and Grassy Area

Technical Staff defined the general neighborhood as bordered by Wheatfield Drive to the north and east, Great Seneca Park to the south and Moonridge Drive to the west, as seen on the following surrounding area map from the Technical Staff report (Attachment 2):



The Hearing Examiner accepts Technical Staff's recommended definition of the general neighborhood. The neighborhood is zoned R-90 (cluster) for single-family residences. Staff reports that there are no other special exceptions within the neighborhood. Exhibit 25, p. 3.

B. The Proposed Use, Landscaping, Lighting, Signage and the Environment

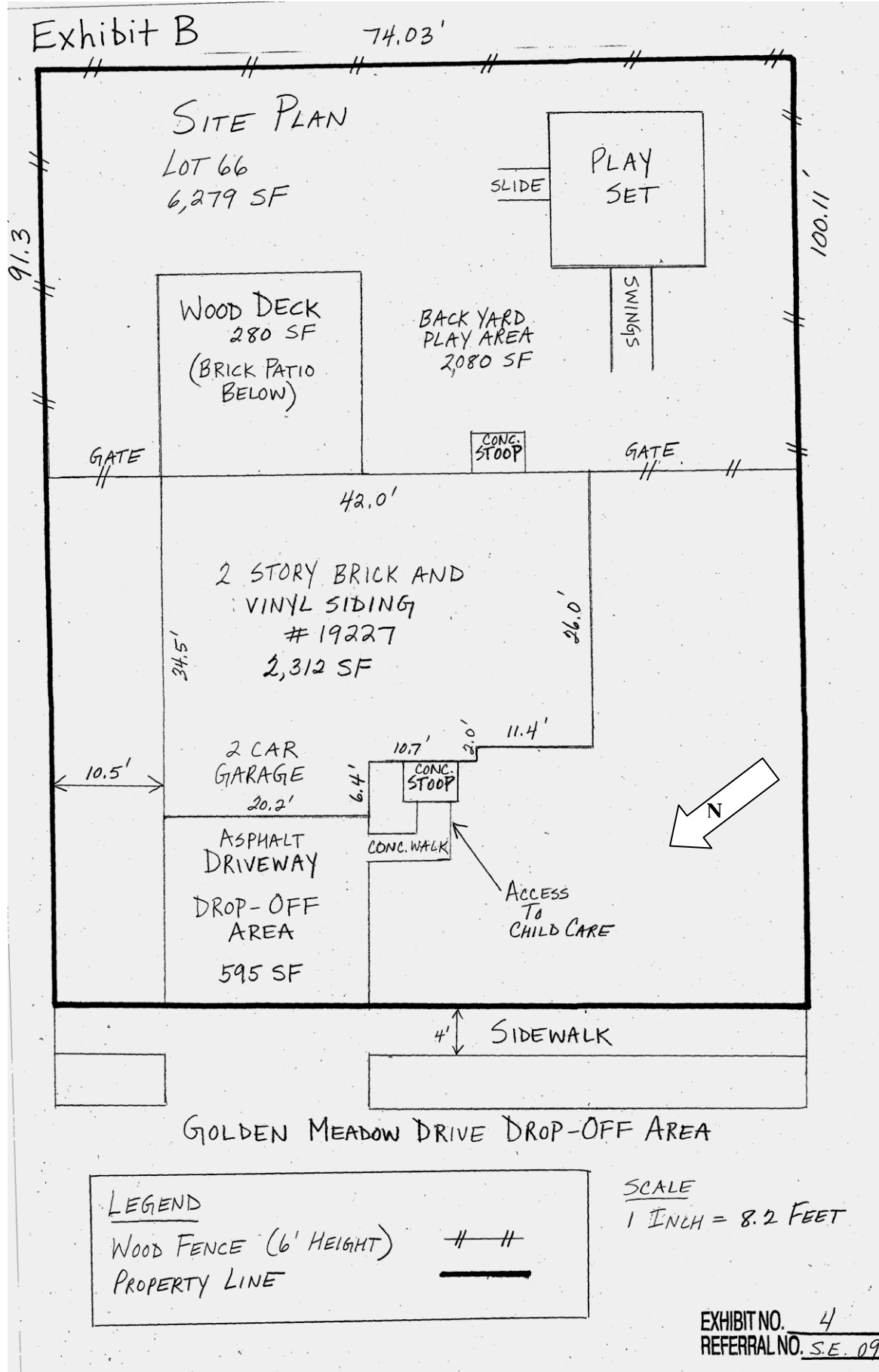
Petitioner proposes to expand the existing “family day care home” for up to 7 children into a “group day care home” for “up to 12 full-time student slots, regardless of age,” though her intention is to enroll children ranging in age from six months up to five years old (not Kindergarten).⁵ While the Hearing Examiner can allow some flexibility in terms of the ages of the children, which will be determined by the childcare licensing authorities, the use of the term “12 full-time student slots” cannot be substituted for the limit of 12 children, because that description is part of the definition of a “group day care home,” as quoted in footnote 1 of this report.

The daycare will be located in the basement and first floor of the existing home. None of the daycare business will be conducted on the second floor of the dwelling, which is Petitioner’s residence. All of the activities associated with the business will be conducted within the home or in the rear yard, which is enclosed with a 6-foot high wooden privacy fence and includes play equipment for the children. These features can be seen on the exterior photos reproduced on page 6 of this report.

According to Technical Staff (Exhibit 25, p. 3), Petitioner reports that there are four rooms (total square footage of 1,100 square feet) that are used for activities and play area for the children. The combined square footage of these four rooms appears to exceed the state’s minimum requirement of 420 square feet for twelve children, but that determination will be made by state licensing authorities.⁶ The Site Plan (Exhibit 4) and photographs of the interior (Exhibits 16(a), (b) and (c)) are reproduced on the following pages of this report.

⁵ Petitioner had specified a maximum of 12 children “ranging in age from 6 weeks to 5 years of age (not Kindergarten)” in her Statement of Operations filed on August 27, 2009 (Exhibit 23(b)), but she revised that limitation based on the suggestions in the testimony of childcare operator, Robin Rice. Exhibit 31(a). Petitioner also specifies that the number and age-groupings of the children, and the required staff, will be dictated by the licensing authorities.

⁶ This figure is based on the State requirement, in COMAR 13A.14.02.17C, that a child care center licensed after December 1, 1971, must provide a minimum of 35 square feet of floor space for each child (12 X 35 = 420).







As can be seen on the Site Plan depicted on page 9, the front entrance of the dwelling will be used by parents when picking up and dropping off their children. Children will be dropped off and picked up primarily from the driveway, but on-street parking area in front of the house may also be used when the driveway is full. As stated by Petitioner in her revised Statement of Operations (Exhibit 31(a)):

The property currently contains three off-street parking spaces, one in the 2-car garage and two on an asphalt driveway located on the subject property in front of the garage. All non-resident staff members will be instructed to utilize street parking on the side farthest from the property. The driveway will be used as the primary drop-off/pick-up parking location. The applicant will instruct parents that they are to first use the driveway spaces if available when they arrive for drop-off/pick-up. If the driveway spaces are not available, then street parking closest to the property will be utilized. At no time will any of the parents leave their cars parked for any extended period of time. Typical drop-off and pick-up times are 5 minutes and 10 minutes, respectively. Unrestricted public parking is available on Golden Meadow Drive, . . .

Staff observed that the driveway provides enough room for four stacked vehicles, and it found the area for pick-ups and drop-offs, both on and off the street, to be adequate. Exhibit 25, p. 3.

Zoning Ordinance §59-E-3.7, provides that a group day care home must provide one space for every non-resident staff member in addition to the parking required for the residence. This provision permits the required number of spaces for employees to be provided on the street abutting the site, as is proposed here. As noted by Technical Staff (Exhibit 25, p. 4), a total of four parking spaces (2 for the residential use and 2 for the day care) are required for a group day care home. Staff found the available parking to be adequate (Exhibit 25, p. 4):

This property contains a two-car garage to accommodate the resident's vehicles. There is a large driveway that can park at least 2 additional vehicles⁷ during off-peak periods and that will be used by the parents for morning drop-off and afternoon pick-up. Additionally, there is adequate on-street parking on the public street in front of the dwelling.⁸ This area can accommodate two parallel parked vehicles.

To demonstrate adequate on-street parking, Petitioner provided photographs of the street abutting her home (Exhibits 6(h) and (i)):



STREET PARKING: VIEW FROM FRONT OF HOUSE FACING GOLDEN MEADOW DR.



STREET PARKING: VIEW FROM FRONT OF HOUSE TURNING RIGHT DOWN GOLDEN MEADOW DR.

⁷ Since Staff indicated that there is room for four “stacked” vehicles, this reference is apparently to un-stacked vehicles.

⁸ The opposition disputes Technical Staff’s finding about adequate parking, as will be discussed in Part II. E of this report.

Petitioner currently possesses a license to operate a childcare facility for up to seven children (Exhibit 15).⁹ She will apply to amend her license to permit her to provide services for up to twelve children following the granting of this special exception application. As required under Code § 59-G-2.13.1(a)(4), the Petitioner has submitted an affidavit affirming that she will comply with all applicable State and County requirements (Exhibit 12). There will also be two non-resident employee positions. The number of non-resident staff present at the facility at any one time may not exceed two, in order to limit the impact on traffic and parking in the area. A brief overlap of five minutes will be permitted to allow for a changeover of part-time personnel.

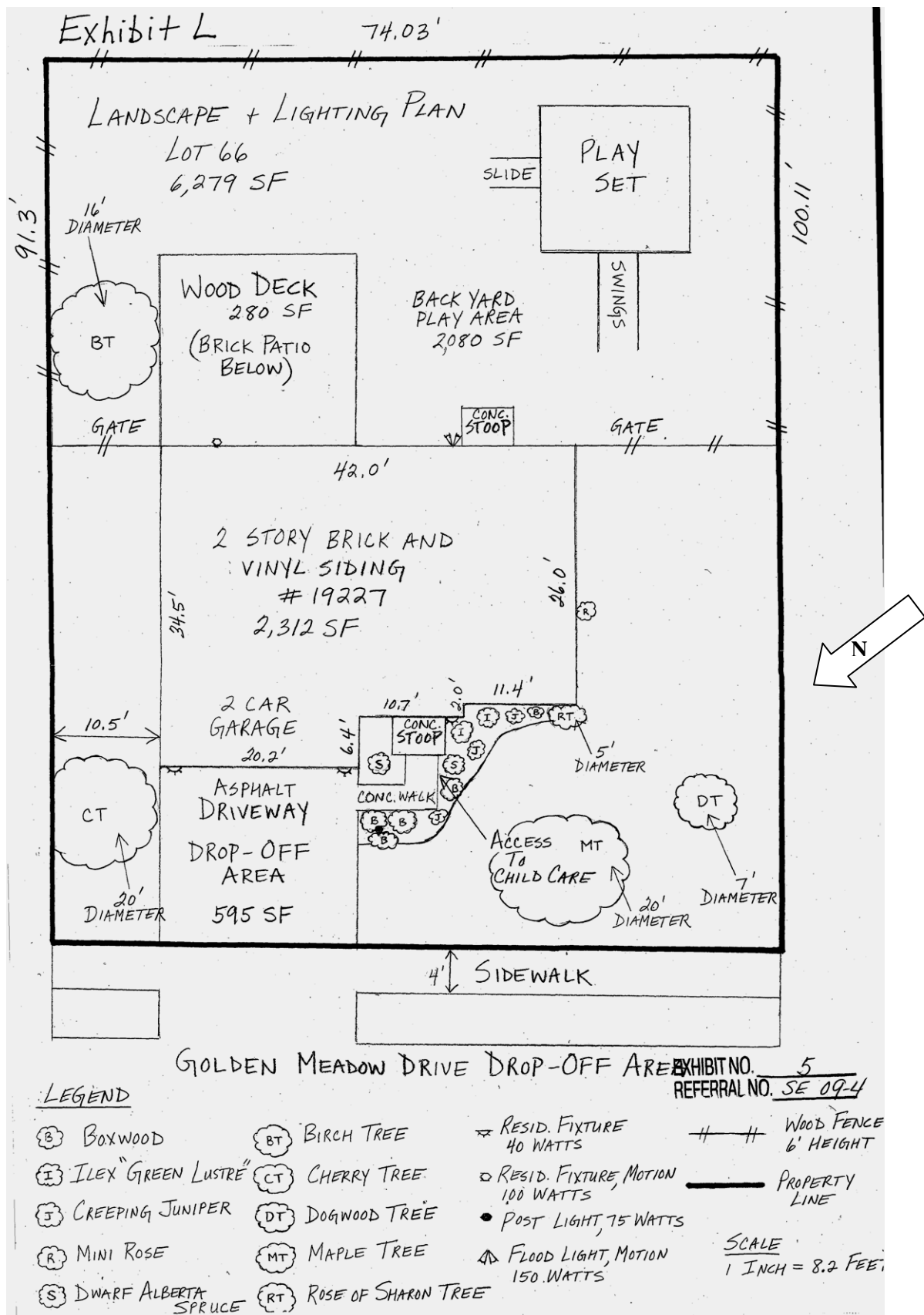
The hours of operation will be between 6:30 a.m. and 5:30 p.m., Monday through Friday, and may be extended without further proceedings until 6:30 p.m., provided adequate staff are on hand and that a prior statement is filed with OZAH noting the change. Child care will not be provided on weekends or overnight at any time. Petitioner staggers arrival times for children between 6:30 a.m. and 9:00 a.m. during the morning drop-off, and between 3:30 p.m. and 5:30 p.m. during the afternoon pick-up. Exhibit 31(a). Parents sign their children in and out of the daycare. Tr. 31-32.

The Hearing Examiner will also require that all children be under the direct supervision of a staff member at all times, both inside and outside the building, and that all gates or other access to the back yard must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off.

Petitioner has provided a Landscape and Lighting Plan (Exhibit 5) showing the location of existing trees and other vegetation on the site, as well as the existing lighting fixtures. No lighting will be added to the exterior of the home; nor will there be any other changes made to the exterior, unless required by the fire marshal. It will therefore retain its residential appearance.

⁹ As previously noted, Petitioner's Statement of Operations claims that Petitioner is currently licensed for up to 8 children, and she so stated in her testimony (Tr. 14), but the license in the record (Exhibit 15) specifies a maximum of 7 children.

The Landscape and Lighting Plan is shown below:



Technical Staff described the landscaping and lighting as follows (Exhibit 25, p. 6):

The attached Landscape and Lighting Plan show a total of 5 lights mounted on the front and rear of the dwelling. There are no external lighting changes proposed. There is a motion sensor flood light at the rear door access and a (100W) hooded residential fixture located above the rear deck patio door. There is no glare onto adjoining properties. The existing landscaping on the site consists of several trees including dogwoods, maples, crepe myrtles, pine, and magnolia. The property is well landscaped with shrubbery and flowers in both the front and rear yards.

Staff found that the “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood.” Exhibit 25, p. 7. Petitioner does not currently display a sign on the property (other than the special exception notice sign). Petitioner may not display a sign for the child care facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.

There are no environmental issues in this case because there are no planned exterior changes. Environmental Planning Staff acknowledged that the site is exempt from forest conservation laws based on the size of the site and the fact no forest or individual trees will be disturbed. Exhibit 13.

C. Master Plan Conformance and Compatibility with the Neighborhood

The subject site is within the area covered by the Germantown Master Plan, approved and adopted in 1989. Specifically, the property is located in Analysis Area MI-5, which is discussed on page 75 of the Master Plan.

Although the Master Plan does not refer to daycare special exceptions, it does provide, “A developer-built community building and day-care center as part of the community facilities of this subdivision would be appropriate.” *Master Plan*, p. 75. Moreover the Master Plan approves the continuation of R-90 Zoning, and the proposed Group Day Care Home is an allowed special exception use in the R-90 Zone, with or without cluster development.

The Master Plan does recommend that the amount of commercial zoning be reduced to assure compatibility with the adjacent residential areas. Although that recommendation refers only to commercial zoning, which is not the case here, Technical Staff found that the proposed use would be compatible (Exhibit 25, p. 4):

Staff has concluded that the proposed use is compatible with the neighborhood, in part, for the following reasons: (1) The applicant property will retain its residential appearance – no external changes will be made; (2) Only the lower level and one room on the main level of the home will be used for the operation of the business; and (3) The rear yard of the property will be used as a play area and will be fully enclosed by a six-foot wood fence. The play area will have recreational equipment for children . . .

Staff also found that the addition of only four children would not significantly affect parking, since Petitioner's driveway will be used primarily for drop-off and pick-up. In light of all these factors, it is fair to say that the proposed use is consistent with the objectives and recommendations of the Germantown Master Plan.

D. Transportation

The site is located off Golden Meadow Drive, which was built as a tertiary residential street with a 50-foot-wide right-of-way and a 20-foot-wide pavement width. Transportation Planning Staff reviewed Petitioner's proposal to increase the number of children to 12 and found that the proposed increase in children would not have an adverse impact on the nearby road system. Exhibit 25, Attachment 10. Staff also determined that the existing vehicular access point and pedestrian circulation system on the nearby road system would not be affected by the proposal.

Finally, Technical Staff noted that because the new use would generate fewer than 30 peak-hour trips (and fewer than 3 new peak-hour trips), the proposal is not subject to the Local Area Transportation Review (LATR) or the Policy Area Mobility Review (PAMR). Although the opposition disagrees, as will be discussed in the next section, the Hearing Examiner finds, based on

the uncontroverted expert evidence from Technical Staff, that the proposed Day Care facility will not have an adverse effect on the transportation system, will not create a nuisance because of traffic, and will satisfy LATR and PAMR.

E. Community Reaction

As mentioned at the beginning of this report, the only written opposition to the proposed day care center was filed by the Seneca Park North Home Owners Association (SPNHOA), which raised concerns about noise, parking, safety (related to traffic) and home values (Exhibit 22). That letter was filed prior to the amendment of the petition, and no one from the SPNHOA appeared at the hearing. Six letters of support for the day care facility were received (Exhibits 14 (4 letters), 26, and 28.). The letters in Exhibits 14 and 28 extolled Petitioner's virtues as a childcare provider. The September 7, 2009 faxed letter in support of the petition (Exhibit 26) noted that the signers were residents of the Seneca Park North Subdivision, where the subject site is located, and asserted that having this daycare facility was a benefit to the neighborhood. They felt that, given the small size of the daycare and the staggered drop-offs and pick-ups, there was not likely to be an issue of congestion, parking or noise. The Office of the People's Counsel also expressed its supports for this special exception. Exhibit 27.

At the hearing, Ms. Robin Rice, a childcare provider and advocate who lives in a different part of the County (Tr. 70-71), testified in support of the petition. Tr. 39-76. Opposition testimony at the hearing came from two neighbors. Petitioner's next-door neighbor, Frank Neher, testified regarding his concern about noise, mostly from outdoor play (Tr. 77-93), and Edwin Melendez, who lives a block away, testified about traffic and parking problems in the neighborhood (Tr. 93-145).

Mr. Neher began his testimony by stating that Petitioner was a "wonderful neighbor." Tr. 76. His problem is that the childcare facility creates noise, from slamming car doors, from car horns sounding when they are locked, and from children during outdoor play. The lots are only about 6,000

square feet, so there is little separation to lessen the noise. Whether this adverse effect is inherent in this type of special exception is discussed in the next part of this report.

Mr. Neher also testified that parking is tight in the neighborhood, partially because he has six vehicles registered to his own property. Since the school bus stop is nearby, and the street is not wide, it may be difficult for the bus to get by when more cars are added by Petitioner. Tr. 83-84.

Mr. Melendez testified that he lives on Golden Meadow Court, which is about a block from the subject site; however, the only exit from his street is onto Golden Meadow Drive, Petitioner's street. He is concerned about congestion in getting onto Golden Meadow Drive, and anticipates that adding four children to the child-care will increase traffic and parking. The parking is increased because young children cannot just be dropped-off; they have to be escorted into the facility, and there will also be employee parking. There is also a school bus stop in this area, so many parents park to wait for the school bus. There will also be added traffic and parking from parents visiting to observe or to discuss contracts. Tr. 94-107. His experience is that the parking spots on Golden Meadow Drive are usually full. Tr. 120-124. There might be only two spaces available on the street for the childcare facility. Tr. 126-127.

Mr. Melendez is also concerned about impact on property values, but he had no evidence that increasing the childcare facility to 12 children would negatively affect property values. Tr. 111-112.

Petitioner denies that she has had any complaints about noise or parking problems since she has been running her daycare facility. Tr. 27-30. When she learned there were issues from seeing SPNHOA's letter, she met with its Board of Directors and contacted parents who drop off children to ask them not to use remote controls to lock their cars. She also feels that traffic to her house is not the cause of the congestion observed by Mr. Melendez. Siblings arrive in the same car, and some children who live nearby are walked to her home by parents. Tr. 148-152.

Ms. Rice also pointed out that children often arrive with siblings in one car, and that some children are absent some days, all of which cuts down on traffic and parking. Tr. 49-50.

It should be observed that the decision on a zoning matter “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Petitioner’s proposal against the specific criteria established by the Zoning Ordinance.

Moreover, the question is not whether there will some adverse effects. Because this use requires a “special exception,” it is assumed that there may be some adverse effects (*i.e.*, inherent adverse effects) in all special exceptions of this type. Nevertheless, the Council elected to make this special exception available in this zone. We therefore must apply a statutory standard, which is spelled out in Part III of this report. It provides that “[i]nherent adverse effects alone are not a sufficient basis for denial of a special exception.” Code § 59-G-1.2.1. These standards and the Hearing Examiner’s evaluation of this case, in light of these standards, will be discussed in the next part of this report.

III. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff and the Planning Board concluded that Petitioner will

have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions (Exhibits 25 and 29).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part IV, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “group day care home” use. Characteristics of the proposed “Five Star Daycare” facility that are consistent with the “necessarily associated” characteristics of group day care home uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with group day care home uses,

or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a group day care home (Exhibit 25, p. 7):

- (1) vehicular trips to and from the site;
- (2) outdoor play areas;
- (3) noise generated by children;
- (4) drop-off and pick-up areas; and
- (5) lighting

To this list, the Hearing Examiner would add the need for parking spaces, either on site or on the abutting street, in accordance with Zoning Ordinance §59-E-3.7.

Technical Staff concluded “There are no non-inherent effects of the use.” Exhibit 25, p. 7.

As stated by Staff,

The child care use in this application is approximately 1,100 square feet and is located in the basement and first floor of the existing two-story single-family dwelling. There are no significant traffic impacts that would result from the proposed special exception. The plan provides adequate parking to serve the use. The large driveway serves as drop-off and pick-up area for children. Existing lighting on the property is adequate and consistent with the residential character of the neighborhood. No new lighting will be added. There will be no changes to the existing dwelling, driveway, parking area in front of the dwelling, or play area in the rear yard. The front and rear yards are well landscaped with mature trees. Flowers and shrubbery are located in the front, side and rear of the dwelling. There are no non-inherent effects of the use.

The neighbors raised a number of issues – noise, traffic, parking and property values. The issue of impact on property values is easily disposed of, since there is no evidence in this record that

having a small daycare operation actually reduces adjacent property values. Although Petitioner's neighbors have expressed some legitimate concerns about noise, traffic and parking, the adverse effects they fear are largely inherent in the operation of this type of facility. The Hearing Examiner considered whether the smaller lot sizes of 5,000 to 6,000 square feet in the R-90 Zone (Cluster) created unusual site conditions rendering the effects of outdoor play non-inherent; however, this use is also permitted by special exception in the R-60 and R-40 Zones, where lot sizes can be as low as 6,000 and 4,000 square feet respectively. The Hearing Examiner therefore concludes that the 6,279 square foot lot size here is not an unusual site characteristic creating non-inherent adverse effects. There may be adverse effects, but they are not non-inherent; they are typical of this use, and the Council elected to permit this use in this Zone.

The Hearing Examiner finds that the relevant characteristics of the proposed use are consistent with the inherent characteristics identified for a group day care home. The building is not of an unusual size or design, but rather is an existing one-family residence in a residential area; the outdoor play area is enclosed by a solid wood fence, and the number of children using it at one time would be limited; given the size of Petitioner's driveway, and the staggered arrival of children, the only additional on-street spaces needed are available in the street abutting Petitioner's home; lighting is residential in style and will not be increased for this special exception; and the amount of traffic generated would not be unusual (or even sufficient to generate a traffic study under the LATR).

Moreover, the adverse effects can be addressed, to some extent, by conditions imposed on special exception. Conditions will be imposed to reduce any adverse impacts upon the neighborhood. No more than 8 children will be permitted to play outdoors at any one time, in order to reduce noise which may affect the next-door neighbors. Petitioner will not be allowed to use a public address system of any kind outside the building, nor will any amplified music be played outside the building.

Petitioner must require that parents accessing the facility may not blow their car horns absent an emergency. (This condition is intended to preclude sounding of horns when a car is locked by remote control or other unnecessary use of car horns.) Interviews of prospective or current clients must be held during non-peak traffic hours to avoid unnecessary impacts on local traffic and parking.

Since a family childcare facility is already operating on the site, the Hearing Examiner finds that allowing up to a maximum of 12 children is unlikely to significantly increase any adverse effects upon the neighbors.

B. Specific Standards

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The Technical Staff report, together with the Petitioner's written evidence and testimony, provide adequate evidence that the specific standards would be satisfied in this case, as outlined below.

Sec. 59-G-2.13.1. Child day care facility.

(a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*

(1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site Plan (Exhibit 4) and Landscape and Lighting Plan (Exhibit 5) satisfy this requirement.

(2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*

(A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required;*
or

(B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: Code § 59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. Because the proposed daycare use is in a residential dwelling, the number of spaces required by Section 59-E-3.7 in this case is four (two for the home and two for the two non-resident employees). Since there is a two-car garage, and there are four off-street spaces available for stacking cars in the driveway, as well as two on-street spaces on Golden Meadow Drive in front of the residence, Technical Staff found the available parking to be sufficient. Exhibit 25, p. 10. The Hearing Examiner agrees.

(3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: Technical Staff found that “The existing driveway provides adequate area for the discharge and pick-up of children.” Exhibit 25, p. 10. The Hearing Examiner agrees because there will be a maximum of two non-resident staff, and conditions will require Petitioner to stagger drop-offs and pickups so that no more than six vehicles visit the site within any one-hour period to drop off or pick up children.

(4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibits 12).

(5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: As discussed in Part II. C. of this report, Staff has concluded that the proposed use is compatible with the neighborhood, for the following reasons: (1) The applicant property will retain its residential appearance – no external changes will be made; (2) Only the lower level and one room on the main level of the home will be used for the operation of the business; and (3) The rear yard of the property will be used as a play area and will be fully enclosed by a six-foot wood fence. Exhibit 25, p. 4.

Moreover, the evidence also demonstrates that the proposed use would not result in a nuisance because of traffic or parking, for the reasons discussed earlier in this report. Exhibit 25, p. 11. As to noise and physical activity, it should be noted that the back yard is completely fenced , so any noise would be mitigated, and the Hearing Examiner has included conditions prohibiting any amplified sound in the back yard and limiting the number of children outside at any one time. Operations are limited to normal work hours, and the facility will not operate in the evenings or on weekends, so the impact on the neighborhood is reduced. Based on these factors, the Hearing Examiner finds that, with the recommended conditions, the use will be compatible with surrounding uses and will not result in nuisance because of traffic, parking, noise or any type of physical activity.

- (b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

C. General Standards

The general standards for a special exception are found in Code § 59-G-1.21(a). The Technical Staff report, the exhibits and the testimony of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A group day care home use is a permissible special exception in the R-90 Zone (Cluster), pursuant to Code §§ 59-C-1.531 and 59-C-1.31(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use as outlined in Part III. B, above.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject site is within the area covered by the Germantown Master Plan, approved

and adopted in 1989. For all the reasons set forth in Part II. C. of this Opinion, the Hearing Examiner finds that the proposed use is consistent with the objectives and recommendations of the Germantown Master Plan.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: The proposed group day care home will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to that structure. The rear yard play area is completely fenced in. The parking is adequate, and can handle the pick-up and drop-off of children. There are no other group day care homes in the general neighborhood, so there is clearly not an excess of similar uses. Technical Staff also determined that the proposed use “will continue to be adequately served by public facilities.” Exhibit 25, p. 9. The Hearing Examiner so finds.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted above, the proposed use will have only inherent effects on the general neighborhood, and it will provide a useful service for the neighborhood.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. As discussed in Part III.B of this Opinion, the special exception, as conditioned, will cause only such noise and physical activity as is inherent in this type of use, wherever it might be located in this zone. Technical Staff found that “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood.” Exhibit 25, p. 7. No new lighting will be added, and operations cease at 5:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the site as a result of the special exception.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that there are no other special exceptions in the neighborhood. Exhibit 25, p. 3. Therefore, the Hearing Examiner finds that the group day care home proposed in this case will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the nature of the area. Moreover, as previously discussed, the proposed use is consistent with the recommendations of the applicable Master Plan, and therefore, under the terms of this criterion, will not alter the nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed group day care home will not be a danger to public health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. On the contrary, it will provide a needed service to the public.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff reports that the proposed use “will continue to be adequately served by public facilities.” Exhibit 25, p. 9. There is no contrary evidence, and the Hearing Examiner so finds.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Hearing Examiner must determine the adequacy of public facilities, including Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (“PAMR”). Technical Staff reviewed these issues and

found that both LATR and PAMR are satisfied, as discussed in Part II. D. of this Opinion. For the reasons set forth in Part II. D. of this Opinion and Decision, the Hearing Examiner agrees with their conclusions and so finds.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that the use as proposed “will not reduce the safety of vehicular or pedestrian traffic because the existing driveway is large enough to accommodate the drop-off and pick-up of children. The applicant will also stagger arrivals and departures.” Exhibit 25, p. pp. 9-10. The evidence of record supports that finding, and the Hearing Examiner therefore concludes that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

D. Additional Applicable Standards

59-G § 1.23. General development standards

(a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The subject property is located in the R-90 Zone, which permits the proposed use by special exception. As noted by Technical Staff (Exhibit 25, p. 5), “[T]he property was developed under the R-90 cluster standards. The proposal conforms to all applicable development standards of the R-90 zone and the standards of the cluster method as specifically modified.” The following table from page 5 of the Staff report (with a minor correction by the Hearing Examiner) lists the applicable standards and the existing measurements for the subject site:

Development Standard	Standard	Proposed/Existing
Minimum Lot Area	5,000 sq. ft.	6,279 sq. ft.
Minimum Lot width: <ul style="list-style-type: none"> ▪ at front building line ▪ at street line 	N/A 25 ft.	66 ft. 63 ft.
Minimum Building Setback: Front Yards	25 ft.	30 ft.
Side Yards <ul style="list-style-type: none"> ▪ One side ▪ Sum of both sides 	Zero ft. Zero ft.	10.5 ft. 24 ft. Approx.
Rear Yard	30 ft.	30 ft
Maximum Building Height	2 ½ stories or 35 ft	Approx. 25 ft.
Maximum Building Coverage	30%	23% Approx.

- (b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. As noted in Part II. B. and elsewhere in this Opinion, the Hearing Examiner finds that there is sufficient parking to meet the code requirements.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
 - (2) *Sand, gravel or clay pits, rock or stone quarries.*
 - (3) *Sawmill.*
 - (4) *Cemetery, animal.*

(5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*

(6) *Riding stables.*

(7) *Heliport and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site's frontage, which meets required standards.

(d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation regulations (Exhibit 13). No trees will be removed.

(e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

(f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner has not proposed any signs. A condition will be imposed which provides that Petitioner may not display a sign for the childcare facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.

- (g) ***Building compatibility in residential zones.*** Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

- (h) ***Lighting in residential zones.*** All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff found that “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood.” Exhibit 25, p. 7.

No new lighting will be added, and operations cease at 5:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the group day care home use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

IV. DECISION

Accordingly, based on the foregoing findings and conclusions, Petition No. S.E. 09-4 for a special exception in the R-90 Zone (Cluster) to operate a group day care home for up to 12 children in an existing single-family detached home, at 19227 Golden Meadow Drive, Germantown, Maryland, is **GRANTED** subject to the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by her representations identified in this Opinion and Decision.
2. Petitioner must comply with all Maryland State and Montgomery County licensure requirements and standards for the operation of a group day care home.
3. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioner shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 12, in which Petitioner certified that she will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.
4. The number of children enrolled at the center shall not exceed 12 children; nor shall it exceed the number of children authorized by State licensing authorities. The ages of the permitted children will be determined by State licensing authorities.
5. The number of non-resident staff present at the facility at any one time may not exceed two, in order to limit the impact on traffic and parking in the area. A brief overlap of five minutes will be permitted to allow for a changeover of part-time personnel.
6. The hours of operation will be between 6:30 a.m. and 5:30 p.m., Monday through Friday, and may be extended without further proceedings until 6:30 p.m., providing adequate staff

are on hand and that a prior statement is filed with OZAH noting the change. Child care will not be provided on weekends or overnight at any time.

7. Arrival and departure times for the children shall be staggered, through contractual agreement between the operator of the day care home and the parents, so that no more than six vehicles visit the site within any one hour period to drop-off or pick-up children. In no event may a child be dropped off before Petitioner or a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
8. Children must be accompanied by an adult to and from the child-care entrance.
9. Petitioner shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building. Parents accessing the facility may not blow their car horns absent an emergency, as this condition is intended to preclude sounding of horns when a car is locked by remote control or other unnecessary use of car horns.
10. All children must be under the direct supervision of a staff member at all times, both inside and outside the building. No more than 8 children shall be permitted to play outdoors at any one time. All gates or other access to the back yard must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off.
11. The Petitioner shall maintain the grounds in a clean condition, free from debris, on a daily basis.
12. Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting

the site. In this case, there will be two non-resident staff, and they must park on the abutting street to leave Petitioner's driveway clear for pick-ups and drop-offs.

13. Interviews of prospective or current clients must be held during non-peak traffic hours to avoid unnecessary impacts on local traffic and parking.
14. Petitioner must provide all the fencing and landscaping depicted on the Site and Landscape and Lighting Plans (Exhibits 4 and 5).
15. Petitioner may not display a sign for the child care facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.
16. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: October 28, 2009

Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: All Parties of Record